



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: APRIL 27, 2023

IN THE MATTER OF:

Appeal Board No. 628243

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective May 31, 2022, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by and on behalf of the claimant. By decision filed November 10, 2022 (322-03485), the Administrative Law Judge overruled the initial determination.

The employer applied to reopen the decision of the Administrative Law Judge filed November 10, 2022. Upon due notice to all parties, a hearing was held at which all parties were accorded an opportunity to be heard and at which testimony was taken. There was an appearance on behalf of the employer. The claimant and her representative were present, but the claimant stated that the hearing was not at a convenient time, and disconnected the call. The claimant is therefore deemed to have failed to appear at the hearing. By decision filed February 7, 2023 (), the Administrative Law Judge granted the employer's application to reopen 322-03485, and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a hearing. We find that since the parties did not appear together at the same hearing, there has been no confrontation or opportunity for cross-examination,

and a further hearing is necessary to provide that opportunity, and to receive additional testimony and other evidence on the issues of the claimant's voluntary separation from employment, and the employer's application to reopen.

Initially, given the testimony provided by the claimant at the November 10, 2022 hearing, the parties are placed on notice that the hearing Judge will also consider whether the claimant quit because the employer failed to pay her on time on three different occasions, and whether those circumstances provided the claimant with good cause to quit for unemployment insurance purposes.

The employer shall provide further evidence of the attempts it made to provide the hearing section with the correct phone number at which to call the employer's witness for the November 10, 2022 hearing. The employer shall produce a witness to testify regarding why the employer's explanation for failing to appear at the hearing was not included in its November 30, 2022 letter seeking reopening of the November 10, 2022 decision, as instructed in the decision. The November 10, 2022 decision and the employer's November 30, 2022 letter shall be received into evidence after the appropriate confrontation and opportunity for objection.

The parties shall be afforded the opportunity to cross-examine the testimony given at the previous hearings. Towards that end, the claimant shall be present at the remand hearing, and the employer shall produce John Soete and Felix Berrios, who testified on February 7, 2023.

The parties are directed to produce documentary evidence of the employer's payments to the claimant during her employment, and both parties shall be questioned further regarding the exact dates the claimant was supposed to have been paid, and the dates she actually did receive her paychecks or was paid by direct deposit. This evidence shall include, but not be limited to, the claimant's production of bank statements for the account into which her paychecks were deposited, and/or into which her paycheck was direct-deposited from June 2021 through May 2022.

The employer is directed to produce payroll or other records to establish pay dates, and a witness who can provide direct testimony regarding the claimant's pay periods and pay schedule.

Relevant documentation produced by the parties shall be received into evidence after the appropriate confrontation and opportunity for objection.

The employer shall also produce individuals with firsthand knowledge of the circumstances of the claimant's separation from employment, including any individual to whom the claimant gave notice of her resignation. The employer shall also produce any documentation regarding the claimant's separation from employment including any written notice provided by the claimant, which shall be received into evidence after the appropriate confrontation and opportunity for objection.

The claimant shall be confronted with the questionnaire completed and submitted to the Department of Labor prior to the issuance of the initial determination in this matter (pages 18 and 19 in the file), in which it is stated that the claimant quit her job because of discrimination. The claimant shall also be confronted with her hearing requests (pages 3 through 8 of the file), which indicate multiple reasons for her voluntary separation, but do not refer to nonpayment of salary. These pages shall be received into the record after the appropriate confrontation and opportunity for objection.

The parties are directed to have with them at the remand hearing, file packets that were sent to them for the previous hearings, as well as any additional documents sent for the remand hearing.

The parties are placed on notice that failure to produce the documents, information, and witnesses directed by the Board may result in the hearing Judge or the Board taking an adverse inference against that party, and concluding that the evidence not produced would not have supported that party's position.

The hearing Judge may receive any other evidence needed to decide the issues.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of the employer's application to reopen 322-03485, and the claimant's voluntary separation from employment, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issues, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MICHAEL T. GREASON, MEMBER